

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)

Petition of Mid-Rivers Telephone Cooperative,)
Inc. for Order Declaring it to be an Incumbent)
Local Exchange Carrier in Terry, Montana)
Pursuant to Section 251(h)(2))

WC Docket No. 02-78

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's *Notice*¹ and Section 1.415 of its Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") submits these reply comments on the Petition of Mid-Rivers Telephone Cooperative, Inc. ("Mid-Rivers") requesting that the Commission issue an order declaring that Mid-Rivers be treated as the incumbent local exchange carrier ("ILEC") in the Terry, Montana telephone exchange, pursuant to Section 251(h)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 251(h)(2).

The *Notice* seeks comment on how Section 251(h)(2) should be applied to Mid-Rivers' specific factual situation as well as to future petitions of this type. In addition to AT&T, a number of parties filed comments taking widely divergent views on whether Mid-Rivers should be designated as an ILEC and the consequences of such classification.²

¹ Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2), WC Docket No. 02-78, Notice of Proposed Rulemaking, FCC 04-252, released Nov. 15, 2004 ("Notice"), published in 69 Fed. Reg. 69573 (Nov. 30, 2004).

² Comments were filed by AT&T, ACS of Anchorage, GCI, Iowa Telecom, National Telecommunications Cooperative Association ("NTCA"), Hancock Communications,

In its Comments, AT&T did not oppose the grant of Mid-Rivers' petition so long as the Commission did not permit Mid-Rivers to assess any access charge increases as a result of such decision. AT&T urged the Commission to find that, under Section 251(h)(2)(A), a carrier "occupies" the market position of the historical ILEC when (i) it provides local exchange service using its *own* facilities, not through resale of another carrier's services or the use of unbundled network elements ("UNEs") purchased from another carrier, and (ii) it is providing service to "all or virtually all" of the subscribers in the service area through the use of such facilities. Further, AT&T urged that for purposes of Section 251(h)(2)(B), the word "replace" should be read in its ordinary everyday sense, *i.e.*, to require that a comparable carrier's facilities must take the place of or supplant the landline facilities of the previously designated incumbent carrier. With respect to the public interest provision of Section 251(h)(2)(C), AT&T agreed that the potential for increased access charges is a valid factor that the Commission should consider in its public interest analysis. Accordingly, it urged that the Commission condition the grant of the petition by prohibiting Mid-Rivers from imposing any access rate increases until the Commission completes its intercarrier compensation reform.

Numerous parties agree with AT&T's reading of Sections 251(h)(2)(A) and (B) that by serving the overwhelming share of customers in the Terry, Montana exchange (approximately 93 percent of the access lines according to the *Notice* (§ 4)), using its own facilities, Mid-Rivers has satisfied the criteria for ILEC classification. *See, e.g.*, NTCA at 3-4; Hancock Communications at 2; Montana PSC at 2-3; RICA at 2; John Staurulakis at 3-4; TCA at 3-4.

Montana PSC, Qwest, Rural Independent Competitive Alliance ("RICA"), SBC, Sprint, John Staurulakis and Telecom Consulting Association ("TCA").

Other parties appear to concede that Mid-Rivers has met the first two criteria for ILEC designation, but, based on the “public interest” provision in Section 251(h)(2)(C), argue that the Commission should impose certain conditions on the grant of Mid-Rivers’ petition. These proposed conditions include suggestions that Mid-Rivers not be permitted to raise access charges but that it must remain subject to the CLEC benchmark; that Mid-Rivers not receive rural high-cost USF support; and that it agree to waive the 251(f) rural exemption from unbundling. Several parties, including GCI (at 4-5), SBC (at 5, 7) and Sprint (at 4-5), contend that any grant should not allow Mid-Rivers to obtain increased USF support or impose higher access charges. Qwest (at 9) also argues that Mid-Rivers should not get increased USF support and that intercarrier compensation issues should be addressed in the Commission’s forthcoming rulemaking on that topic. By contrast, the rural interests and the Montana PSC all urge that Mid-Rivers should be designated as an ILEC and that it is entitled to higher USF support and access charges. *See* NTCA at 5; Montana PSC at 4-7; RICA at 4-6; John Staurulakis at 4-5; TCA at 6.

AT&T agrees with the commenters that recognize the sole effect of designating Mid-Rivers as an ILEC under 251(h)(2) is that it will have the obligations of an ILEC under *that* section. *See, e.g.*, Iowa Telecom at 4-5; Montana PSC at 8. Section 251(h)(2) states, in its entirety:

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier *for purposes of this section* if – (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1); (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section. (emphasis added)

Thus, the section expressly provides that ILEC designation has only *one* purpose – *i.e.*, to apply ILEC duties under section 251 – and thus it does *not* result in automatic entitlement to rural access charges or rural USF support.

But even aside from any question as to the scope of Section 251(h), sound public policy dictates that the Commission establish a rule that an entrant *cannot* compete its way into an entitlement to higher USF and access charges. As several parties point out (*see* GCI at 3-5; SBC at 5, 7; Sprint at 3-5), the fact that Mid-Rivers has successfully competed, built a network and won the overwhelming majority of customers in Terry, conclusively confirms that it simply does not *need* rural USF support and higher access charges. AT&T agrees that it would be contrary to the public interest to grant Mid-Rivers a windfall through higher USF support and access charges in these circumstances. Rather, Mid-Rivers – just as the historical incumbent, Qwest – should remain subject to *nonrural* USF support, and its access charges should be constrained by the CLEC benchmark.

Predictably, Qwest (at 2-3, 9, 10, 12) and SBC (at 3-5, 7) contend that once another carrier has achieved sufficient market penetration to be classified as an ILEC in a given area, then there is no ILEC at all, and both the historical ILEC and the new entrant should be free to operate without dominant carrier regulation and the legacy unbundling obligations of Section 251(c) of the Act. Qwest further contends that it is no longer dominant and purports to make a request for forbearance in its comments (at 14-15). *Accord* SBC at 3, 7.

Contrary to these claims, the grant of Mid-Rivers' Petition does not and cannot result in any automatic reclassification of the historical incumbent LEC. The Comments

of the Montana PSC, which strongly oppose any change in the treatment of the historical incumbent LEC, are particularly instructive in this regard. The Montana PSC (at 8) urges that “Qwest should retain its status as an incumbent carrier, and should remain subject to the unbundling obligations of Section 251, the carrier of last resort obligations of Section 214, and Qwest’s high cost calculation method should not be a function of Mid-Rivers’ classification as an ILEC.”³ In support, the Montana PSC points out (*id.*) that “[t]here is nothing in the Act that precludes two ILECs from operating in one exchange at the same time.” In fact, “[t]he Act contemplates a situation where there might be two co-existing ILECs, and 251(h) provides a basis for treating two ILECs differently based on the carrier’s status as a legacy incumbent ILEC under 251(h)(1) or as a new ILEC designated under 251(h)(2).”⁴ Accordingly, the Montana PSC correctly concludes (at 8, 9) that “Qwest’s regulatory status is totally independent of Mid-Rivers’ petition,” and that “Qwest should not be reclassified as a competitive local exchange carrier in the Terry exchange.”

This result also follows for significant procedural reasons. As several commenters point out, Qwest is the statutory incumbent under Section 251(h)(1) and thus must file for forbearance under Section 10 of the Act, 47 U.S.C. § 160(c), if it wants to shed that status. *See, e.g.*, GCI at 14-15; RICA at 7; Montana PSC at 9-10. Section 1.53

³ Indeed, Mid-Rivers should continue to receive high cost support as a CLEC in the Terry exchange, notwithstanding its “treatment” as an ILEC per section 251(h)(2).

⁴ *Id.* In arguing that only a facilities based new entrant (rather than an entrant that provides service through resale or UNEs) can be treated as an ILEC under Section 251(h)(2), AT&T’s Comments (at 4) assumed a situation in which there was a single facilities based ILEC in an area. However, AT&T agrees with the Montana PSC and other commenting parties that this is not necessarily the case and that in given circumstances, such as would arise here if Mid-Rivers’ petition were granted, there would be two ILECs in an area.

of the Commission's rules, 47 C.F.R. § 1.53, specifies that "any petition requesting that the Commission exercise forbearance authority under 47 U.S.C. § 160(c) shall be filed as a *separate* pleading and shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. § 160(c)." (emphasis added) Until such time as Qwest (or any other legacy ILEC) files and the Commission approves such a petition, it remains subject to all applicable ILEC obligations.

CONCLUSION

For the foregoing reasons, AT&T does not oppose grant of Mid-Rivers' Petition, so long as the public interest is protected by restricting any increase in USF support and access rates, and urges the Commission to apply Section 251(h)(2) of the Act in accordance with its plain meaning, as discussed herein.

Respectfully Submitted,

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